

Before the
COPYRIGHT ROYALTY TRIBUNAL
Washington, D. C.

In the Matter of:

1982 AND 1983 JUKEBOX
ROYALTY DISTRIBUTION
PROCEEDINGS

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Docket No. 83-2
Docket No. 84-2 83 JD
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DIRECT CASE OF
ASCAP, BMI AND SESAC

The American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI) and SESAC, Inc. have filed a joint claim with the Copyright Royalty Tribunal in these proceedings. ASCAP and SESAC hereby submit their portion of the Direct Case in accordance with the Copyright Royalty Tribunal's order of July 30, 1985.

Attached is the direct testimony (including exhibits) of all witnesses. In accordance with the Tribunal's rules, we have prepared such testimony in the form of witnesses' statements which will be summarized, highlighted, or read into the record in whole or in part. We also designate the entire record of the 1981 Jukebox Royalty Distribution Proceeding for inclusion into our direct case.

We shall prove that ASCAP, BMI and SESAC are jointly entitled to all 1982 and 1983 jukebox royalties except for our agreed-upon settlement amounts with Italian Book Corp., and a few hundred dollars, at most, for LAM.

Respectfully submitted,

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Dated: September 13, 1985

DIRECT TESTIMONY OF
GLORIA MESSINGER

I. Background and Qualifications

My name is Gloria Messinger. I am Managing Director of ASCAP, and appear before the Tribunal on behalf of ASCAP, BMI and SESAC.

I received my bachelor's degree from Smith College and my law degree from Yale Law School. In 1955, I joined ASCAP's Legal Department, where I eventually became Assistant General Counsel. I specialized in membership and distribution matters, and for a time served as ASCAP's Distribution Manager. Except for a few early years devoted entirely to child rearing, I have worked exclusively at ASCAP. In 1981, I became ASCAP's Managing Director and Chief Operating Officer. As such, my responsibilities include supervising the licensing of the Society's repertory; distributing its revenue; public, customer and member relations; as well as transactions with foreign performing right organizations.

II. The Strength of the ASCAP, BMI and SESAC
Repertories Generally

As you know, ASCAP, BMI and SESAC have reached a voluntary settlement, as the Copyright Act permits and encourages, and so appear jointly before you. We have therefore put aside our rivalries in this forum, and my statements should be taken in that context.

Based on my many years of experience in the performing rights licensing area, I can categorically state that virtually every piece of copyrighted music performed in the United States is licensed by one of our three organizations. It is difficult, given our overwhelmingly dominant position when our claims are combined as they are here, to avoid using language which would normally be thought to be hyperbole. I therefore want to be very clear to the Tribunal: When I say that "virtually" all performed copyrighted music is in our repertories, I do not mean only 90%, or only 99%. I mean quite literally that we license all but the most minute fraction of a percentage point of all performances. Let me explain why.

Given the millions of musical performances rendered all across the country each day, it would be impossible for any songwriter or even the largest copyright owner, acting alone, to know what public performances of his works were taking place, let alone to negotiate licenses for them. By the same token, it would be difficult, if not impossible, for most music users to locate and negotiate agreements with the individual owners of performing rights whose music they wished to perform. This is the reason for the existence of performing right organizations like ASCAP, BMI and SESAC, which are nationwide and international in their operations.

Therefore, logically, songwriters and copyright owners join one or the other of our organizations, so they may realize the economic benefits Congress intended that they reap under the Copyright Act. And, conversely, it would be illogical not to join ASCAP, BMI or SESAC, for no other organizations exist which have the ability to license and collect fees on a nationwide and worldwide basis.

Our dominant position in the music industry is shown by the fact that, together, we license hundreds of thousands of music users. Our combined annual revenues for each of 1982 and 1983 were on the order of \$350 million. These facts should be contrasted with the comparable figures for other claimants in these proceedings. Indeed, these facts can form the basis for the judicial or administrative notice concerning the dominant position ASCAP, BMI and SESAC hold in the music industry, to which the Second Circuit has referred. See, A.C.E.M.L.A. v. CRT, 226 U.S.P.Q. 509 at 514 (2d Cir. 1985).

Thus, these facts give the Tribunal a basis for awarding us the share of the 1982 and 1983 funds we are claiming -- everything except our agreed upon settlement with the Italian Book Corp. and the few hundred dollars, at most, to which the LAM claimants may be entitled. We shall supplement these facts with others to prove our entitlement.

III. The Strength of the ASCAP, BMI and SESAC
Repertories in Spanish-Language Music

Our prior submissions in these proceedings have demonstrated the value of our combined repertories in Spanish-language music. We have provided lists of heavily-performed Spanish-language songs and lists of foreign performing rights societies whose Spanish-language repertories we license in the United States.

I know I speak for ASCAP, when I tell you that we take great pride in the efforts we have made on behalf of our Hispanic members, and in our representation of them and of foreign writers of Spanish-language music. I am sure our friends at BMI and SESAC are also proud of their efforts on behalf of their Hispanic affiliates.

IV. A Limited Survey of Jukeboxes in
Hispanic Communities Shows LAM May Be
Entitled To At Most A Very Small Award

We are mindful of the Tribunal's recommendation, in its Order of July 30, 1985, that a survey of jukeboxes be made. As we have previously pointed out, such a statistically valid survey would be very expensive. The BMI survey made for the 1979 jukebox royalty distribution proceedings cost at least \$50,000. Thereafter, when the Tribunal, in its 1979 decision, urged the parties to make a joint survey, we asked ASCAP's outside economists how much a valid survey would cost. They

estimated that it would cost at least \$200,000. That price is obviously prohibitive for these proceedings.

But we did want to do something to assess the conflicting claims to jukebox performances of Spanish-language music. Accordingly, I asked that ASCAP's licensing offices conduct an informal and very limited survey of the songs on jukeboxes located in Hispanic neighborhoods in four American cities with large Hispanic populations: New York, Miami, San Antonio and Los Angeles.*

At the outset, I must state that this limited survey was prepared solely by ASCAP, without the knowledge of BMI or SESAC. BMI and SESAC did not participate in its creation, conduct or analysis. And, of course, therefore neither BMI nor SESAC endorse it or have any comment on it. Now, here is what we did:

ASCAP field representatives -- the men and women who license what we term "general" establishments like bars, grills, taverns and restaurants -- were told to visit about 20 such places with jukeboxes in the Hispanic neighborhoods of each of those four cities. Ultimately, we looked at 76 jukeboxes in

*According to the 1980 Census, New York's Hispanic population was 1,405,957, and it ranked first among all cities in Hispanic population; Los Angeles' was 815,989, ranked second; San Antonio's was 421,774, ranked fourth; and Miami's was 194,087, ranked seventh.

all: 20 in New York, 19 in Miami, 17 in San Antonio and 20 in Los Angeles.

Our field representatives were instructed to make a list of every song on each of those jukeboxes, and note other information such as name and address of the establishment and jukebox owner, and whether the boxes were licensed. Those lists and that information were then forwarded to our New York office for analysis.

Before telling you the results, I must stress that we do not offer this survey as a statistically valid, representative random sample. We do not know if it is representative or unrepresentative of the universe of all, some, or any licensed jukebox performances, of Spanish-language or other-language works, or of boxes in Hispanic communities.

There are other limitations as well: Many unlicensed jukeboxes were found and included. Of the 76 jukeboxes we looked at, only 6, or 7.9%, had current certificates showing that they were in compliance with the law. Sixty-four jukeboxes, or 84.2%, did not have a current certificate, and we did not have that information for the remaining 6, or 7.9%. This says much about the question of compliance levels which has been addressed by the Tribunal and, more recently, by Congress. Do the works performed on licensed jukeboxes differ from those on

unlicensed jukeboxes? Given the very few licensed jukeboxes we examined, we cannot answer that question.

Further, all we did was copy the songs listed on each jukebox. We do not know which of those songs were performed, or in what amounts; some may be heavily played, and others not at all. And, of course, we conducted this survey in August, 1985; the songs listed in 1985 undoubtedly differ from those listed in 1982 and 1983.

In addition, an important limitation is that we have only looked at boxes in Hispanic communities. Their relationship to the entire population of jukeboxes throughout the country is unknown, but any use of this data must make some assumptions about that relationship as I shall discuss.

All we can say as a certainty is that this survey shows the extent to which these particular jukeboxes listed certain songs in August, 1985. Nevertheless, the results are interesting.

We found a total of 11,592 listings on the 76 jukeboxes. Many of those listings, of course, duplicated titles. Here is what our analysis of those listings showed:

First, much of the music on these jukeboxes in Hispanic communities was not Spanish-language music. Of the 11,592 listings on the 76 surveyed jukeboxes, 6,809, or 58.7%,

were in the Spanish language. The remainder, 4,783, or 41.3%, were English-language songs.

Second, we used the information LAM has provided on its allegedly most-performed works to see how many of the songs on the lists were licensed by LAM. Of the 11,592 listings, only 45, or 0.388%, were works whose undisputed ownership was claimed by LAM.

When you consider that all the jukeboxes that we surveyed were in Hispanic communities, and that jukeboxes in other communities undoubtedly include virtually exclusively English-language works, applying these results to the entire jukebox population requires a substantial reduction in LAM's percentage.

We believe that an estimate that one jukebox in twenty is located in an Hispanic community is probably an overestimate. The jukebox operators have always alleged that boxes are heavily located in rural areas. For example, in the 1980 Jukebox Royalty Adjustment Proceeding before the Tribunal, the Amusement and Music Operators Association -- the trade association of jukebox operators -- alleged that 65% of all jukeboxes were operated in "small towns" of 50,000 population or less. AMOA Proposed Findings of Fact and Conclusions of Law, 16; AMOA Exhibit 10, pages 9, 11, 15, 17. In addition, the AMOA alleged that half of the operators they surveyed indicated that all of their jukeboxes were in such towns;

nearly two-thirds of the operators said that over half of their jukeboxes were in such towns, and only 14% said that none of their jukeboxes were in such towns. AMOA Exhibit 10, pages 15, 17.

On the other hand, Hispanic communities are typically urban. According to the 1980 Census, 40% of the Hispanic population resides in cities with population over 200,000. By way of comparison, less than 20% of the total United States population resides in such cities.

And, our 1-in-20 estimate is further supported by population figures: According to the 1980 Census the Hispanic population of the United States, 14,608,673, represented 6.4% of the total population of 226,545,805.

If we make such a 1-in-20 estimate, then the applicable percentage of the jukebox funds to which LAM would be entitled would be 0.0194% (1/20th of the figure given above.) Applying this percentage to the 1982 jukebox fund (\$2,907,539) and 1983 jukebox fund (\$2,862,703) would result in awards of \$564 for 1982 and \$555 for 1983 to LAM -- close to the range suggested by the ASCAP survey results previously submitted to the Tribunal, and to which Paul Adler, who is directly responsible for ASCAP's membership and distribution matters, will testify.

V. Conclusion

Based on these facts, and the further facts which our other witnesses will present, we believe that we have proved our joint entitlement to all 1982 and 1983 jukebox royalties except for our agreed-upon settlement amounts with Italian Book Corp., and a few hundred dollars, at most, for LAM.

DIRECT TESTIMONY OF
PAUL S. ADLER

I. Background and Qualifications

My name is Paul S. Adler. I am ASCAP's Director of Membership.

I received my bachelor's degree from Oberlin College and my LL.B. and LL.M. degrees from Columbia Law School and New York University Law School, respectively. Upon graduation I joined the United States Department of Justice, and was with the Government for about three years, first with the Department and then with the Commission on Civil Rights. I then came to ASCAP as a staff attorney, and soon moved over to the business side, first as an assistant to the then Director of Distribution and then as Director of Distribution. In 1974, I left ASCAP to practice law, but soon returned as Director of Membership. In the Spring of 1983, I became head of both the Membership and Distribution areas of the Society. I appear before you today to support the joint claim of ASCAP, BMI and SESAC.

I shall testify on four topics: (1) the analyses of LAM's 1982 and 1983 performance track record using the ASCAP survey; (2) the performance track record of ASCAP, BMI and SESAC works; (3) an analysis of ASCAP, BMI and SESAC works on various trade paper charts in 1982 and 1983 and (4) some of our prior dealings with and about LAM.

II. LAM's Performance Track Record

In conformity with our prior submissions and the Tribunal's order, we took the list of LAM songs which they claimed were most-performed, and ran them through ASCAP's survey records for the calendar years 1982 and 1983. We have provided a description of the ASCAP survey to the Tribunal in our filing of June 24, 1985, and the details of our findings concerning performances of LAM works in the ASCAP survey in our filing of September 3, 1985. I incorporate both filings by reference. Let me summarize the findings, and, of course, I would be happy to answer any questions the Tribunal may have about the analysis we undertook. [Mr. Adler's testimony will here follow the text of Section I.A., pages 2-5, of the Comments of ASCAP, BMI and SESAC filed September 3, 1985.]

I believe that the survey results bear repeating: If performances in all media are used, LAM would be entitled to about \$157 for 1982 and \$112 for 1983. If performances in radio only are used, LAM would be entitled to about \$326 for 1982 and \$266 for 1983.

III. The Performance Track Record of ASCAP, BMI and SESAC

Based on my experience of approximately 16 years in ASCAP's Membership and Distribution areas, I would like to offer some facts concerning the joint entitlement of ASCAP, BMI and SESAC.

EXHIBIT 1

ANALYSIS OF BILLBOARD CHARTS

1982

<u>Chart Name</u>	<u>No. of Weekly Listings</u>	<u>No. of Annual Listings</u>	<u>No. of Listings Licensed By ASCAP, BMI & SESAC</u>	<u>No. of Listings Not Licensed By ASCAP, BMI & SESAC</u>	<u>Percent Licensed By ASCAP, BMI & SESAC</u>
Hot 100	100	5200	5200	0	100%
Country	100	5200	5200	0	100%
Black	100	5200	5200	0	100%
Adult Contemporary	50	2600	2600	0	100%

To my knowledge, there are virtually no performed copyrighted musical works which are not in the ASCAP, BMI or SESAC repertories. I constantly monitor the results of the ASCAP survey, and other relevant information, and have done so for years. Based on my experience, the performances of unaffiliated works -- and they would include works of the Italian Book Corp., LAM, and any other unaffiliated copyright owners who may exist -- do not equal more than a few hundredths of a percentage point of the performances of all copyrighted music. All the rest are performances of works in the repertories of ASCAP, BMI, and SESAC, and the affiliated foreign societies we represent.

IV. Analysis of Trade Paper Charts

In its July 30, 1985, Order, the Tribunal said that it would weigh the evidentiary value of hit song charts. At best they are of limited value here. We looked at Billboard and RePlay charts, which purport to measure retail store record sales and "one-stop" sales reports, not performances. And they deal only with current hit songs, and not "standards", "oldies", and the like which may continue to receive performances even though not currently on any chart.

Nevertheless, we undertook two chart analyses. The first was an analysis of the Billboard charts in 1982 and 1983. These widely respected trade paper charts are generally relied upon by the music community. There are four such charts, "Hot

100," "Country," "Black," and "Adult Contemporary." The results are shown in Exhibits 1 and 2. All songs listed on all the 1982 charts were in the ASCAP, BMI or SESAC repertories (See Exhibit 1.) All songs listed on the 1983 "Hot 100," "Black," and "Adult Contemporary" charts were licensed by ASCAP, BMI and SESAC. Three songs on the "Country" charts, which were listed for a cumulative total of 10 weeks, were not. These "unaffiliated" songs represented less than two-tenths of one percent of that chart's 1983 listings (See Exhibit 2.)

Second, RePlay magazine -- which is one of the trade papers for the jukebox and coin-machine industry -- publishes jukebox "sales charts", allegedly listing popular jukebox songs. I cannot say anything about the validity of these charts, for I know nothing of how they are compiled. RePlay has three charts: "Pop," "Country" and "R&B." We analyzed those listings in the 1982 and 1983 RePlay charts we had available. The results are shown in Exhibits 3 and 4. All songs listed in both years were in the repertories of ASCAP, BMI, or SESAC.

From these Exhibits, it is clear that virtually everything on the charts is licensed by ASCAP, BMI, and SESAC.

V. Past Contacts With and About LAM

I first heard of Latin American Music when they approached ASCAP in 1981 through one of their previous attorneys, and asked what sort of monetary advance they would receive if they became an ASCAP member. (In those days, ASCAP

might offer a prospective member an advance based on the prospective member's prior track record of performances -- determined in exactly the same way we have determined LAM's 1982 and 1983 track record -- as well as current activity, projected earnings, catalogue, and the like. The advances would then be recouped against royalties as they were earned.) We provided the answer to them -- their performance record then differed very little from what it is now, by the way. They rejected the offer and we never heard from them further.

Recently, however, we have received inquiries from ASCAP broadcaster licensees, who tell us that they have been contacted by A.C.E.M.L.A. for a license. The broadcasters want to know if the organization is legitimate; evidently, from what the broadcasters tell us, they do not get much satisfaction when they inquire of A.C.E.M.L.A. what works they purport to represent. And, the broadcasters tell us, they are particularly irate at the demand for a license because they do not think they perform any A.C.E.M.L.A. works.

VI. Conclusion

I hope these facts will aid the Tribunal in making its determination. I urge the Tribunal to follow our suggestion that ASCAP, BMI and SESAC should receive all of the 1982 and 1983 funds except for the agreed-upon settlement amounts with Italian Book Corp., and a few hundred dollars, at most, for LAM.

EXHIBIT 2

ANALYSIS OF BILLBOARD CHARTS

1983

<u>Chart Name</u>	<u>No. of Weekly Listings</u>	<u>No. of Annual Listings</u>	<u>No. of Listings Licensed By ASCAP, BMI & SESAC</u>	<u>No. of Listings Not Licensed By ASCAP, BMI & SESAC</u>	<u>Percent Licensed By ASCAP, BMI & SESAC</u>
Hot 100	100	5200	5200	0	100%
Country	100	5200	5190	10*	99.8%
Black	100	5200	5200	0	100%
Adult Contemporary	50	2600	2600	0	100%

<u>*Song Title</u>	<u>Period on Chart</u>	<u>No. Weeks on Chart</u>
Where Do You Go	2/12-3/5/83	4
Downright Broke My Heart	7/23-8/6/83	3
Easy Catch	4/9-23/83	3

EXHIBIT 3

ANALYSIS OF REPLAY CHARTS

1982

<u>Chart Name</u>	<u>No. of Weekly Listings</u>	<u>No. of Available Listings*</u>	<u>No. of Listings Licensed By ASCAP, BMI & SESAC</u>	<u>No. of Listings Not Licensed By ASCAP, BMI & SESAC</u>	<u>Percent Licensed By ASCAP, BMI & SESAC</u>
Pop	30	840	840	0	100%
Country	20	560	560	0	100%
R & B	20	560	560	0	100%

*28 weekly charts available for analysis

EXHIBIT 4

ANALYSIS OF REPLAY CHARTS

1983

<u>Chart Name</u>	<u>No. of Weekly Listings</u>	<u>No. of Available Listings*</u>	<u>No. of Listings Licensed By ASCAP, BMI & SESAC</u>	<u>No. of Listings Not Licensed By ASCAP, BMI & SESAC</u>	<u>Percent Licensed By ASCAP, BMI & SESAC</u>
Pop	30	780	780	0	100%
Country	20	520	520	0	100%
R & B	20	520	520	0	100%

*26 weekly charts available for analysis

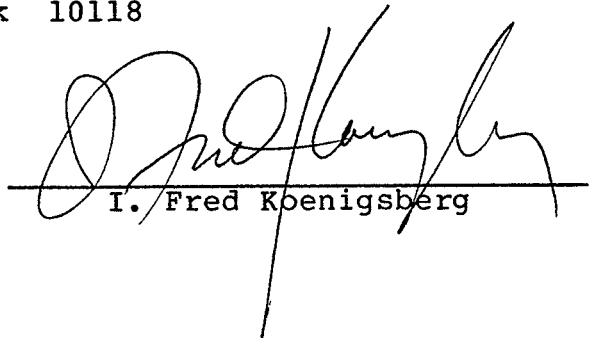
CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Direct Case of ASCAP, BMI and SESAC were served, via first-class or express mail, postage prepaid, on September 13, 1985, to the following:

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